No. 84-549

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In the Supreme Court of the United States

OCTOBER TERM, 1984

IRVING M. DROBNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF

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December, 1984

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ARGUMENT

I.

The *jurisdictional* question presented by this case is whether the "in connection with" requirement of the federal securities laws is satisfied by misrepresentations which occur after the sale of stock, are not directed to the seller, are causally unrelated to the sale, and do not pertain in

any way to the stock or the consideration paid for it.[1] The government's answering brief has refused to deal with this question or with the arguments or authorities advanced in Argument I of the Petition.[2] It has, moreover, sedulously put out of view the theory upon which Count II of the indictment was actually presented to the jury and upon which the court below bottomed its affirmance. (*See* Pet. for Cert. at 8-9).[3]

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[1] In its brief, the government does not deny that Question 1 presented by the Petition is jurisdictional. Nor does it make any meaningful attempt to answer the argument that such jurisdictional questions may be considered by this Court even though not raised in or decided by the court below. (*See* Pet. for Cert. at 12, n.14). The government's brief merely states the general principle of cases such as United States v. Lovasco, 431 U.S. 783, 788, n.7 (1977), that failure to raise a claim in the Court of Appeals precludes review in this Court. (Gov. Br. at 8). Apart from the fact that "general propositions do not decide concrete cases", Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting), *Lovasco* makes clear that where there are "exceptional circumstances", arguments not raised below would be considered by this Court. As we have previously demonstrated, the questions in this case surely fall within the category of "exceptional circumstances" so that review by this Court is indeed appropriate. (*See* Pet. for Cert. at 12, n.14).

[2] Significantly, while the government's brief makes some attempt to deal with the authorities in Arguments II and III of the Petition, it ignores every case cited in Argument I.

[3] At pages 8-9 of the Petition, we demonstrated beyond peradventure that the government's theory of the case at trial was that the "in connection with" requirement of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 could be satisfied so long as Drobny knew that he was being paid with Jet money, even though Mr. Drobny's misrepresentations to Mr. Diefendorf occurred five days after the sale of the stock was completed, had nothing to do with the stock or the financial capability of the purchaser, were made not to the seller of the stock but to a banker to induce him to issue a cashiers check to Joe Rosin, and were causally unrelated to the purchase and sale of the Jet stock.

Instead, the government has reiterated the "touching" language of *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6, 12-13 (1971)—thereby begging the very question to be decided[4]—and has suggested that Mr. Drobny was properly convicted because he aided and abetted DeVeau's fraud. There are three salient difficulties with this thesis. First, the touch test is, as we have demonstrated, inherently unworkable and dissonant with the doctrinal development of the securities laws over the past thirteen years. (*See* Pet. for Cert. at 12-20).

Second, the government is flatly incorrect in suggesting that the jury was properly instructed on an aider and abettor theory of liability. (Gov. Br. at 7, 10). On the contrary, the district court's instructions in connection with Count 2 explicitly and unambiguously precluded the jury from resting its verdict on a finding that Mr. Drobny had aided and abetted DeVeau's fraud.

The district court instructed the jury that "[i]n deciding the guilt or innocence of the defendants as to these counts [Counts 2-6], you are to consider the following instructions." There then followed the boiler-plate language of 15 U.S.C. §78j(b). This, in turn, was followed by an unedifying reiteration of the elements of the offense, including the "in connection with" language, which the court made no attempt to define. The instructions on Counts 2 through 6 concluded with a definition of the words "scheme and artifice" and boiler-plate language regarding the use of instrumentalities of interstate commerce. (Pet. for Cert., App. E at 19-21).

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[4] The government's reliance on cases such as *Jannes* v. *Microwave Communications, Inc.*, 461 F.2d 525 (7th Cir. 1972) (Gov. Br. at 10), ignores Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977), which makes plain that the decision in *Jannes* can no longer be considered viable.

At the conclusion of the instructions on Counts 2 through 6, which made not the slightest mention of 18 U.S.C. §2 or of the aider and abettor theory discussed in the government's brief,[5] the district court turned its attention to Counts 7 through 13, which did *not* charge Mr. Drobny. Counts 7 thorugh 10 charged DeVeau with mail fraud in violation of 18 U.S.C. §§1341 and 2 (Tr. 254-57), and Counts 11 through 13 charged DeVeau with making false statements to a federal agency in violation of 18 U.S.C. §§1001 and 2 (Tr. 257-58). It was in connection with these latter instructions on Counts 7 through 13 that the district court discussed the meaning of aiding and abetting under 18 U.S.C. §2. (Tr. 261-62; Gov. Br. at 7).

Thus, when the jury instructions are viewed in proper perspective, it is manifest that the jury could only have concluded that the aider and abettor instructions were directed to DeVeau's responsibility under Counts 7 through 13—not to Mr. Drobny's responsibility under Count 2. For, as the court explicitly instructed the jury, in deciding the guilt of Mr. Drobny under Counts 2 through 6, they were only to consider the specific instructions applicable to those counts, none of which even hinted at aider and abettor liability. (*See* Pet. for Cert., App. E at 19-21).

The conclusion that the aider and abettor instructions were not intended to apply to Mr. Drobny's conduct under Count 2 is reinforced by the absence from the government's opening statement and closing argument of even the slightest suggestion that Mr. Drobny's misrepresentations

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[5] *Cf.*, Chiarella v. United States, 445 U.S. 222 (1980) (criminal conviction under the securities laws cannot be bottomed on a theory on which the jury was not instructed). *Compare* Shepard v. United States, 290 U.S. 96 (1933) (where evidence received and considered for an improper purpose, conviction cannot be sustained even though an arguably proper basis might have existed).

to Diefendorf were designed to aid and abet DeVeau's fraud—a proposition advanced for the first time in the government's responsive brief. Rather, as we have shown, it was the government's theory at trial that Mr. Drobny's misrepresentations *to Diefendorf*, coupled with the movement of the $330,000 NSF check in interstate commerce, made out a case under the federal securities laws. (*See* Pet. for Cert. at 8-10, 11-12, 17-18).[6]

Finally, the government's aider and abettor theory raises serious questions under the federal securities laws, for this Court has yet to permit aider and abettor liability under §10(b) of the 1934 Act and Rule 10b-5. *See Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 378, n.4 (1983). Additionally, an aider and abettor theory necessarily raises the question of whether DeVeau's looting of Jet Industries constitutes a violation of the securities laws. For, if DeVeau's fraud is not actionable under §10(b) or Rule 10b-5 then, *a fortiori*, Mr. Drobny cannot be an aider and abettor.

In the instant case, the sellers got precisely what they bargained for, namely a cash down payment plus DeVeau's personal note for the balance. That there was subsequent collateral fraud by DeVeau (*viz.*, depleting the assets of Jet Industries), does not form the predicate for an invocation of the federal securities laws. *See Santa Fe Industries* v. *Green*, 430 U.S. 462 (1977). *See also Dirks* v. *SEC*, ... U.S. ....., 103 S.Ct. 3255, 3265, n.23 (1983)

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[6] Virtually all of the misrepresentations set forth in the government's brief occurred long after the specific fraud charged against Mr. Drobny in Count 2, related not to Count 2 on which he was convicted but to the other counts on which he was acquitted, and were never argued to the jury as a basis for imposition of liability on an aider and abettor theory under 18 U.S.C. §2.

("a violation [of §10(b) or 10b-5] may be found only where there is intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."). Consequently, the government's aider and abettor theory cannot withstand analysis.

II.

The government's response to Arguments II and III of the Petition (*see* Pet. for Cert. at 20-24), consists essentially of the contention that the failure of Mr. Drobny's trial counsel to have requested certain jury instructions precludes review by this Court. We need not repeat the arguments made in the Petition. It is enough to say that none of the authorities cited by the government under their plain error argument (Gov. Br. at 13-14) involved applicability of the federal securities laws and the question of whether recklessness can be the basis for liability under §10(b) and Rule 10b-5.

CONCLUSION

The Petition For Writ of Certiorari should be granted.

Respectfully submitted,

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